

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV:2008-4824

BETWEEN

Premnath Bowlah

Claimant

And

The Attorney General of
Trinidad and Tobago

Defendant

APPEARANCES:

Anand Ramlogan for the Claimant

Russel Martineau SC instructed by Anushka Ramsaran

DATE OF DELIVERY: December 9, 2009

Before the Honourable Mr. Justice Devindra Rampersad

JUDGMENT

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1. On 17 December 2008, the Claimant filed a fixed date claim form for administrative orders pursuant to part 56 of the Civil Proceedings Rules 1998 [CPR]. The application was supported by an affidavit of the Claimant of even date. A case management conference was fixed for the 9th February 2009 pursuant to part 56.7 (7) of the CPR which was not in compliance with part 56.7 (8). The Claimant failed to comply with part 56.10 (6) and the court has no evidence as to when the Defendant was served with these proceedings. At the case management conference held on the 9th of February 2009, the Judge granted to the Defendant leave to file and serve an affidavit in reply, if any, on or before 3 May 2009 and **the case management conference was adjourned to 1 June 2009**. The Defendant filed an affidavit in response on 15 April 2009 - the affidavit of Dawn Harding - and on 13 May 2009, the Claimant filed this application.
2. This is an application made on 13 May 2009 by the Claimant for the following reliefs:
 - 2.1. For leave to amend his claim form; and
 - 2.2. For disclosure of certain specific documents.
3. The application is supported by an affidavit of the Claimant which was deposed to on 13 May 2009 and filed on even date and is seemingly based on the following assumptions:
 - 3.1. That the 1st case management conference was held on the 9th day of February 2009;
 - 3.2. That part 20.1 (3) is applicable.

The CPR provisions:

4. Part 2 of the CPR defines “**statement of case**” as including a claim, defence, counterclaim, ancillary claim form, defence to counterclaim and a reply to a defence.
5. Part 20 of the CPR reads

“Changes to statement of case

20.1 (1) A statement of case may be changed at any time prior to a case management conference without the court’s permission.

(2) The court may give permission to change a statement of case at a case management conference.

(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.

(4) A statement of case may not be changed without permission under this rule if the change is one to which rule 19.2 (change of parties) applies.

(5) Any amended statement of case must be filed promptly at the court office.

(6) Where a statement of case is amended, the amendments must be verified by a certificate of truth unless the court orders otherwise.”

6. Part 56.12 of the CPR reads:

“Case management conference

- 56.12 (1) At the case management conference the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of parts 25 to 27 of these rules apply.
- (2) The judge may allow the Claimant to amend any claim for an administrative order or to substitute another form of application for that originally made.
- (3) At the case management conference the judge may allow any person who appears to have sufficient interest in the subject matter of the claim to be heard whether or not he has been served with the claim.
- (4) The judge must direct whether any person or body having such interest is to make submissions by way of written brief or whether such person or body may make oral submissions at the hearing.
- (5) Where there is more than one claim by one or more persons or bodies or against one or more persons in respect of the same office made on the same grounds the judge may direct that they be consolidated.”

The application to amend:

7. The application seeks to add 2 new grounds to the claim form upon which the claim for relief is based. The proposed additions are as follows:

“j. *The Claimant was treated unequally in that unlike other officers he was denied the right to make representations on his own behalf to the PSC in accordance with regulation 15 (3).*

k. *Claimant was treated unequally when compared to officers Harold Philip and Raymond Hunte because no vacant office was preserved for him pending the hearing and determination of his criminal case and/or the points system was unfairly applied to assess his suitability for promotion but it was not applied in officer Hunte’s case.”*

8. This application is grounded on new facts which the Claimant alleges were revealed to him as a result of an affidavit of one Dawn Harding filed on behalf of Defendant on 15 April 2009. The facts relied upon were not referred to, or mentioned in the Claimant's affidavit in support of his application. However, in the grounds of the affidavit which supported the application, attorney for the Claimant relied upon paragraphs 15 and 16 of the affidavit of Dawn Harding. Those paragraphs stated as follows:

“15. *It is not correct to say, as the Claimant does in his affidavit, that the Commissioner of police recommended Mr. Hunte for retroactive promotion based on the fact that he was exonerated on the disciplinary charge. Mr. Hunte qualified for recommendation for promotion and a position was reserved pending the outcome of the disciplinary proceedings against him. No position was reserved for the Claimant pending the outcome of the proceedings against him and he did not qualify for promotion.*

16. *As to paragraph 13 of the Claimant's affidavit while it is true that the commendations were not mentioned in the letters from the Commissioner of Police it is not correct, as the Claimant says, that it is clear that had the points system been applied Mr. Hunte might not have attained the*

required points. If the point system had been applied to Mr. Hunte, he may well have qualified for promotion even without points for commendations.”

9. As mentioned, the Claimant does not specifically refer to these paragraphs from Dawn Harding’s affidavit in his affidavit but does say that new facts revealed in that affidavit prompted him to file notice of application. He went on to say at paragraph 4 of his affidavit that:

“I have since spoken to PC Ramsook and realized that he was initially bypassed for promotion and was promoted as a result of representations he made to the police service commission pursuant to regulation 15 [3]. PC Ramsook was therefore able to secure retroactive promotion after his criminal and disciplinary matters were dismissed. This was based on the same policy and precedent that I wish to invoke in my favor.”

10. The suggestion therefore is that he spoke to PC Ramsook after Dawn Harding's affidavit was filed and served on his attorney at law, Ms. Cindy Bhagwandeem. He then went on to annex copies of correspondence pertaining to PC Ramsook’s promotion. No date was given in respect of when this correspondence was brought to his attention. Those correspondence were follows:

10.1. Letter dated 17 October 2008 addressed to Ms. Cindy Bhagwandeem, attorney at law, from the Service Commission's Department referring to **“No. 13378 Police Constable Rakesh Ramsook, Police Service, Ministry of National Security- Allegation of Discreditable Conduct/Promotion to the ranks of Corporal and Sergeant”**

10.2. Letter dated 17th of October 2008 addressed to PC Ramsook and signed by the Director of Personnel Administration advising him of his promotion to the rank of Police Corporal.

10.3. Letter dated the 12th August 2008 from Ms. Cindy Bhagwandeem, attorney at law, to the Police Service Commission and the Commissioner of Police referring to **“Matter concerning PC Ramsook”**. In that letter, Ms. Bhagwandeem referred to the fact that the client's promotion had been put on hold pending the outcome of the charge which was subsequently withdrawn. Inquiries will be made as to his promotion and certain correspondence were referred to. On page 3 of that letter, which was described to be a pre-action letter pursuant to the pre-action protocol practice direction, Ms. Bhagwandeem said at the 2nd paragraph thereof:

“Consistent with the constitutional right to be presumed innocent until proven guilty, a vacant position is normally held in abeyance or escrow pending the hearing and determination of the criminal matter. I trust that this was done in the case of PC Ramsook as to do otherwise would amount to a violation of the rights to equality of treatment.”

10.4. Several memoranda from the Commissioner of Police to PC Ramsook in relation to the investigation being conducted in response to allegations made against him.

- 10.5. Several bits of correspondence between PC Ramsook and the Police Service Commission in relation to PC Ramsook not receiving scores under "Performance Appraisal" and "Commendations" as designated to him by letter from the Trinidad and Tobago Police Service dated 14 November 2005.
- 10.6. A bundle of correspondence regarding Officer Raymond Hunte and rulings from the Chief Personnel Officer spanning the period November 1990 to 22 January 2007.
- 10.7. A memorandum from the Commissioner of Police to the Director of Personnel Administration dated 15 November 2006 referring to memorandum Pol: 1974 Vol II Temp. 6 dated November 6, 2006 in respect of representation received from Inspector Raymonde Hunte referring to a memorandum dated 6th of August 2002 indicating that a position of police inspector was left vacant pending the outcome of disciplinary proceedings against this officer. In this November 6, 2006 memorandum, the Commissioner of police indicates his support and guidance in matters where a person is absent from duty as a result of suspension or interdiction and he attaches a copy of a directive dated 3 November 1999 for the assistance of the addressee.
11. At paragraph 5 of the Claimant's affidavit he said that he was never informed that he was not recommended for promotion in accordance with regulation 15 and he was denied the right to make representations to the PSC. At paragraph 6 he said that he did not know that a vacant office was not preserved for him or that a vacant office was held for Officer Hunte pursuant to a "directive" given by the PSC in a memorandum dated the 6th day of August 2002 which he had never seen. He then speaks about a memorandum dated 6 November 2006 referred to by the Commissioner of Police in this (sic) letter of the 15th day of November 2006. These memoranda are two of the documents he has sought disclosure of in his application. The Commissioner of Police' letter dated 15 November 2006 was also annexed to his claim form as "P.B.7".

The Claimant's submissions:

12. In his submissions, the Claimant's attorney at law relies on grounds 1 to 4 of his application to amend in support of the change in circumstances which became known after the first case management conference warranting a change in the statement of case pursuant to part 20.1 (3) of the CPR 1998.
13. In passing, at paragraph 4 of his submissions, attorney at law for the Claimant says that: "*This is an application for Administrative (sic) orders and Part 56.12 (2) states that the judge may allow the Claimant to amend his claim at a CMC.*" No authority is provided in support of the application of this particular portion of the CPR nor does the Claimant make any submission in respect of whether part 56.12 (2) supersedes part 20.1 (3) in relation to administrative law matters or how both parts are to be read and construed.

14. The Claimant did not rely on any case law in support of his application for amendment.

The Defendant's submissions:

15. No mention is made in the Defendant's submissions in relation to part 56.12 (2) and so the relationship between that part and part 20.1 (3) is not discussed.
16. The Defendant relied on the following authorities in opposition to the application for the amendment:

- 16.1. ***Dean Mohammed Ali v Salesh Ramnarine CV08-01471*** - a decision of the Hon. Mdm. Justice Jones which was made in an action which was not an administrative law action and which did not consider the effect of part 56.12 (2). Leave to amend was refused as it was found to be made too late in the day, and in any event, was made after 3 case management conferences were held.

- 16.2. ***Dean Mohammed Ali v Salesh Ramnarine Civ App No. 252 of 2008*** - this was a procedural appeal in respect of the refusal in the preceding authority wherein the Hon. Mendonca JA briefly stated that the 1st case management conference fixed for 10 October was adjourned after the 1st date to a 2nd date - namely 23 October - and that by that 2nd date, no application had as yet been made for an amendment to the pleadings and the judge proceeded on that 2nd occasion to give directions for the trial of the matter. Therefore there was no dispute that the 1st case management conference was in fact concluded on the 2nd occasion and that the application was made subsequent to that 2nd hearing - on 26 November - for which a change of circumstances necessarily had to have been shown in order for the court to allow any amendment.

- 16.3. ***Ramesh Seebalack v Charmaine Bernard Civ App No. 261 of 2008*** - this was a procedural appeal in respect of the grant of leave to amend a statement of case in a **running down action**. In this case, the Claimant advanced two reasons why the statement of case had to be amended - the first was because she had misplaced the original receipt for funeral expenses and the second was that she had experienced intense grief after her brother's death as a result of which she did not return to his place of work. Warner JA held that:

“..... an enlightened understanding of the law, or where a litigant is suddenly urged in whatever fashion to prosecute his case with due diligence or dispatch, are not matters which constitute a change of circumstances, as envisaged by the Rule”

In those circumstances, the appeal was granted and the leave to amend reversed.

- 16.4. ***Mungal v Scotia Trust and Merchant Bank CV06 - 3031*** - this was a decision of the Hon. Mr. Justice Moosai in relation to an action arising out of negligence and negligent advice and the question of the matter being

statute barred. Comments were made by the Hon. Judge in relation to part 19.2 (7) of the CPR suggesting what he thought “a change in circumstances” in the context of the CPR meant.

Analysis and resolution:

Was the first case management conference concluded?

17. I wish to first of all deal with the assumptions which I mentioned at paragraph 3 above. I am of the view that the first case management conference did not conclude on 9 February 2009 but that first case management conference was in fact adjourned. On 9 February 2009, the Defendant had not yet filed an affidavit in opposition to the Claimant's claim. As a result, time was given for that to be done and the case management conference adjourned. Without an affidavit in opposition, the court would not be in a position to manage the case as provided under part 25 of the CPR. Part 25.1 provides that:

“Court’s duty to manage cases:

25.1 The court **must** further the overriding objective by actively managing cases, which may include –

- (a) identifying the issues at an early stage;
- (b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (c) encouraging the parties to use the most appropriate form of dispute resolution including, in particular, mediation, if the court considers that appropriate and facilitating the use of such procedures;
- (d) encouraging the parties to co-operate with each other in the conduct of proceedings;
- (e) actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party;
- (f) deciding the order in which issues are to be resolved;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step will justify the cost of taking it;
- (i) dealing with as many aspects of the case as is practicable on the same occasion;
- (j) dealing with the case or any aspect of it, where it appears appropriate to do so, without requiring the parties to attend court;
- (k) making appropriate use of technology;
- (l) giving directions to ensure that the trial of the case proceeds quickly and efficiently; and
- (m) ensuring that no party gains an unfair advantage by reason of his failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application.

[Emphasis mine]

18. It is obvious to me that it was not possible for the court to further the overriding objective by actively managing this case on 9 February 2009. The court would have had 2 options open to it on that date - either proceed with the case as if it was undefended by giving judgment to the Claimant under part 27.2 or, as was done in this case, allow the Defendant time to put in an affidavit setting out its defence therefore permitting the Defendant to bring issues before the court which the Defendant thought would be relevant to the matter for the court’s

determination- thereby allowing the crystallization of the issues for the court to manage. Having chosen the latter course, it could therefore only mean that the first case management conference had to be adjourned to allow the Defendant to put in an affidavit indicating what objection the Defendant had to the matter before the court and what issues the court had/has to manage. Only then could a court conduct any management process. The above mentioned case of *Dean Mohammed Ali v Salesh Ramnarine* (supra) is an example of the adjournment of the first case management conference at work at first instance, which was recognized at the Court of Appeal.

19. To my mind, the first case management conference is an event, a fact, not a name. The ritualistic administrative function of giving a date does not impose the judicial connotations of case management until there has been an actual exposition of the matters intended to be dealt with as referred to at Part 25. If those matters are not dealt with on the 1st court appointed date, I see it necessary to consider at what point a Judge has dealt with the matters. It is important to note that Part 25.1 is not a checklist but a guide to the matters which a court ought to consider. The first hearing did not manifest into the first case management conference to my mind.
20. In those circumstances, if part 20.1 (3) is applicable, then I am of the respectful view that the Claimant was still within time to have amended his claim form without the necessity of having to show any change of circumstances.
21. Consequently, I do not feel that leave is required or that a change of circumstances is necessary to allow the amendment sought since the first case management conference has not been completed.

What is the effect of part 56.12 (2)?

22. Out of completeness, I would just mention in passing certain observations about part 56.12 (2).
23. Part 56 of the CPR provides a regime for the conduct and procedure in relation to administrative law matters. It therefore is meant to be, to my mind, especially geared for the administrative law legal process. For example, part 56.7 specifies that an application for an administrative order must be made by a fixed date claim headed "Originating Motion" [a different requirement to all other fixed date claim forms] accompanied by an affidavit which **must state** the matters referred to at part 56.7 (4) [another different specification and requirement geared specifically for these types of proceedings]. On issuing the claim, the court office must fix a date for a case management conference no more than 4 weeks after the date of issue and the claim form and affidavit must be served on the Defendants not less than 14 days before the date fixed for the case management conference. This therefore only effectively allows 2 weeks for service of the claim form. The evidence is on affidavit but the Defendant carries the duty to follow the provisions of part 10 which includes the duty to set out his case and the consequences of not setting out his defence.

24. The whole process therefore is geared towards expediency which is anticipated to be even faster than the rest of the already highly pro-active court-driven CPR procedures. For example, a party could apply to a judge in chambers to bring forward the date of the case management conference to a date sooner than 4 weeks from the issuance of the claim.
25. Part 56.12, intituled “Case Management Conference” provides the background and the framework which part 56 envisages must be used in the management of administrative law matters. Specific reference is made in part 56.12 (1) to the applicability of parts 25 to 27 of the CPR. The framers of the rules therefore have shown an intention to pick Part 56 out of the general rules as prescribed in the other parts of the CPR and to set it apart somewhat and to fix specific guidelines and rules to follow in relation to this specific scenario i.e. administrative law matters. This brings us then to part 56.12 (2). This part specifically provides that the judge may allow the Claimant to amend any claim at a case management conference. This is a similar provision to part 20.1 (2). The rule is silent, however, as to the requirement for there to be a restriction in relation to the power to amend after the first case management conference only if there has been a change in circumstances. In other words, there is no corresponding part 56.12 provision to part 20.1 (3). No reference is made whatsoever within part 56 to the applicability of part 20. The language of part 20.1 seems to be at variance with the language and purport of part 56. Whereas the definition of “statement of case” at part 2 incorporates a claim form, the words “statement of case” are inapplicable to part 56 and do not feature whatsoever therein. The whole approach seems to be different - although the overriding objective still remains the same. In such circumstances, I am not convinced that there is a specific provision for there to be a change of circumstances after the first case management conference in order that the court considers favorably an application for an amendment. However, I do not view that this power to amend is one that remains at large until the date of hearing of the application as I envisage that the court’s management powers would allow a court to shape and mold the progress of the case in keeping with parts 25 to 27 of the CPR under the umbrella of the overriding objective. Further, once the case management conferences have come to an end, so too does the jurisdiction to amend. Unfortunately, this argument as to the interaction of part 20 and part 56.12 (2) was not advanced by either side and I have not been called upon to decide the point.

Conclusion

26. Having already found that the first case management conference had not yet come to an end, and for that matter, is still pending, I believe that the 2nd presumption is rendered otiose and the application for leave to amend, even though superfluous, is granted.

The application for disclosure:

27. In his application, the Claimant has sought disclosure of the following:
- 27.1. The memorandum dated the 6th day of August 2002 – referred to in the memorandum exhibited as “P.B.7” to the Claimant's claim;
 - 27.2. The memorandum dated 16th of November 2006– referred to in the memorandum exhibited as “P.B.7” to the Claimant's claim;
 - 27.3. The letters of promotion whereby Officer Hunte was promoted to the rank of inspector and beyond;
 - 27.4. The names of all police officers who won their disciplinary and/or criminal matter in court and were subsequently promoted with retroactive effect since July, 2003 to present.
28. There is no evidence before me that the Claimant made a request of the Defendant for any of these documents or information and I am therefore not convinced of the necessity for this application.
29. I accept as good law as submitted by the Claimant that the Defendant is obliged to disclose all relevant facts. In accepting this position, I bear in mind the words of Lord Walker in **Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and another** [2004] UKPC 6 where he said at paragraph 85 of the Lexis Nexis report:

*In **R (on the application of Huddleston) v Lancashire County Council** [1986] 2 All ER 941, Sir John Donaldson MR (with whom the other members of the Court of Appeal agreed), having referred to the preliminary stage of obtaining leave to seek judicial review, said (at p 945):*

"But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.

Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration."

The Master of the Rolls then referred to the submission that it was not for the public authority to make out the applicant's case for him, and said: "This, in my judgment, is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be

unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

[86] Similar observations have been made in many later cases, including several decisions of the House of Lords. It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings.

30. In **R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** [2002] EWCA Civ 1409, [2002] All ER (D) Laws LJ at paragraph 53 said:

"However there is - of course - a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see Padfield [1968] AC 997, per Lord Upjohn at 1061G - 1062A."

and at paragraph 55, Laws LJ continued:-

"On this matter of disclosure we have, in my judgment, to bear in mind that what matters is the effect of any failure on our appreciation of the overall merits of the case; we are not concerned to discipline or penalise the Secretary of State."

31. I have also borne in mind the observations made in **R v Secretary of State for Health ex parte London Borough of Hackney** - Queen's Bench Division (Crown Office List) CO/6996/94 by Legatt LJ who reiterated that discovery in judicial review proceedings would not be allowed in the mere hope that some thing would turn up – the clichéd “fishing expedition” argument – and who also restated that unless the applicant is in a position to assert that the evidence relied on by the governmental authority is false or inaccurate, it is inappropriate to grant discovery to allow the applicant to check the accuracy of the evidence in question. The applicant's application before me is on a different ground in this matter since the applicant is requiring full and frank disclosure of matters not within his purview which he deems relevant and necessary for the resolution of the issue rather than trying to assert falsehoods or inaccuracies at this time.

32. Of course, these are not judicial review proceedings but, instead, are administrative law proceedings for breach of the Constitution which requires a somewhat different perspective and approach – the former being a review of a particular decision-making process for example, and the latter being a review of the entire framework and environment in which those decisions are made. The use of part 56 for administrative orders under the Constitution calls for the exercise of the court’s discretion which is guided by principles of equity and the operation of the provisions of the Constitution, which enact the framework for the matters under consideration. This is a different perspective to the natural justice and “unreasonableness” arena of the judicial review process. However, I am of the view that, generally, matters involving the State require the State, which acts in the interest of the citizenry and which is objectively responsible for the social and economic livelihood and policy of the country and its citizens, to act openly in furtherance of that duty unless special circumstances such as matters of natural security or confidentiality apply. Consequently, I adopt the judicial review approach to disclosure in matters involving the State and, in particular, the “*cards faced upwards*” approach.
33. The Claimant has relied upon the following authorities in support of his application for disclosure:
- 33.1. Civ App No. 211 of 2007 – **Gopichand Ganga & ors v The Commissioner of Police and the Police Service Commission** - this was a decision of the Court of Appeal in relation to a **judicial review** matter which was dismissed by the judge at first instance. At page 8 paragraph 20 of the judgment, the Court of Appeal mentioned in passing that: “*At the case management stage of the proceedings the appellants sought limited discovery but, according to the judge, that application was never pursued. It is unfortunate, because it may have led to further inquiry, climaxing in a possible challenge to the Commission's role.*”
- 33.2. HCA No. 707 of 1998 – **Air Caribbean Ltd v BWIA** - this was a judicial review matter dealt with prior to the CPR which provides authority for the assertion that in **judicial review** matters the respondent is obliged to give a public law court a full and fair disclosure as to how the respondent arrived at its decision.
- 33.3. HCA No. 342 of 2000 – **Walkerwells Ltd v WASA** - this was also a **judicial review** matter dealt with prior to the CPR and this is the only one of the matters referred to by the Claimant which specifically addresses an application for discovery. The Hon. Mr. Justice Stollmeyer said at page 8 *et al* of his judgment that:
- “Discovery, however, would be ordered where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter and will also be ordered even if the effect of doing so is to go behind the contents of an affidavit if there is some matter before the court which suggests that the contents of that affidavit are not accurate, or that it is in some respect incorrect. Additionally, if an*

affidavit only deals partially and not sufficiently or adequately with an issue, it may be appropriate to order discovery to supplement the affidavit, as compared to challenging the accuracy of what has been said there. Ultimately, it would depend on the nature of the issue which the court is required to consider..... Additionally, in deciding whether discovery should be ordered, it is necessary to determine positively that the document is needed for the determination of an issue. If it is not needed, or the court cannot say that it is needed given what is before it, then discovery should not be ordered. Further, if the party raises a factual issue of sufficient substance which leads the court to conclude that it may or will not be able to resolve the issue fairly to all parties without discovery then the discovery may be ordered.”

34. The Defendant has relied upon the following cases in opposition:
 - 34.1. **Wallis Smith Trust Co. v Deloitte** (1997) 1 WLR 257 - this was an action brought by the liquidators of the plaintiff company against the accounting firm Defendants alleging breach of their duties in contract and tort in failing to detect that the company's business was being fraudulently conducted. The liquidators sought discovery of tapes and transcripts of interviews conducted by the Serious Fraud Office (which was not a party to the proceedings) in respect of a former partner and a former manager of the Defendant company. The Court of Appeal, by Neill LJ, laid out a 7 part approach which he considered to be the correct approach in applications for discovery including those involving allegations of immunity from production. Those issues of immunity from production and confidentiality have not arisen in these proceedings before me.
 - 34.2. **Basdeo Panday & Oma Panday v Her Worship Ejenny Espinet** – CV08 – 2265 - this is a post CPR decision on an application for further information in a judicial review application and a portion of the judgment is relied upon by attorney for the Defendant in support of the "fishing expedition" argument.
35. Subsequent to the writing of this judgment, my attention was drawn to four additional authorities submitted by the Claimant which were not made available to me until much later than the filed date:
 - 35.1. Civ App No. 56 of 2006:- **Winston Gibson v The Public Service Commission**;
 - 35.2. Civ App No. 162 of 2006:- **Public Service Commission v Hermia Tyson Cuffie**;
 - 35.3. CV 07-01093:- **Harridath Maharaj v The Public Service Commission**;
 - 35.4. HCA No. 393 of 2005:- **George Daniel v The Attorney General of Trinidad and Tobago**
36. Relying upon the observations of the Hon. Mr. Justice Stollmeyer referred to above, I see that this application for disclosure, without looking at the failure to make the request prior to the application, as one which relates to documents

which the Claimant alleges would be necessary for a fair disposal of this action. Equality of treatment is the main thrust of the Claimant's substantive application. Necessarily, therefore, the Claimant would require documentary evidence in relation to persons in a similar situation as the Claimant to assess whether he was afforded equality of treatment. That documentary evidence would inevitably be stored in the notional possession of the Defendant – on behalf of the decision maker - [as well as in the hands of the particular individuals to whom that information may relate]. I am therefore of the view that, once those documents/information are relevant to the issue before me and are necessary for the fair disposition of the case, then those documents ought to **be** before me.

The requested documents:

37. **The memorandum dated the 6th day of August 2002 – referred to in the memorandum exhibited as “P.B.7” to the Claimant's claim & the memorandum dated 16th of November 2006– referred to in the memorandum exhibited as “P.B.7” to the Claimant's claim;**
38. Even though an objection was referred to in the written submissions of the Defendant, copies of the same were produced to the court and annexed to the submissions filed on 7 September 2009. Consequently, I do not suppose that the Defendant is pursuing the opposition to these documents since its disclosure has been made voluntarily.
39. **The letters of promotion whereby Officer Hunte was promoted to the rank of inspector and beyond;**
40. In his submissions, the Claimant's attorney referred to Officer Hunte as being used as a comparator for the purpose of proving unequal treatment. He submits that the Defendant seeks to differentiate and distinguish Officer Hunte in an attempt to prove that the Claimant is not in fact similarly circumstanced whereas in fact there is no credible or rational explanation as to why a position was reserved for Officer Hunte but not for the Claimant.
41. The Defendant says that there is no dispute as to whether Officer Hunte was promoted or not so that the letters of promotion are not necessary in order to dispose fairly of the claim or to save costs. In any event, it is argued for the Defendant that the documents are irrelevant since Officer Hunte and the Claimant are not similarly circumstanced since the former was exonerated prior to the imposition of the new points system in November 2005. Notwithstanding that however, copies of the same were produced to the court and annexed to the submissions filed on 7 September 2009. Consequently, I suppose that the Defendant is also not pursuing the opposition to these documents since its disclosure has been made voluntarily.

42. **The names of all police officers who won their disciplinary and/or criminal matter in court and were subsequently promoted with retroactive effect since July, 2003 to present.**
43. This seems to be the only real issue in respect of disclosure between the parties. In fact, this more correctly seems to be an application for further information under part 35 of the CPR which mandates under part 35.1 (2) that the party seeking to obtain further information **must serve a request** for the information that he wants and part 35.2 (2) provides that an order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs. Part 35.3 limits the time for making an application for compelling a reply to a request for information by saying that such an application “*may not be made before the time for serving witness statements has expired nor less than 42 days before the date fixed for the trial*”. Neither of those conditions is applicable in this matter
44. The Defendant's objection to the production of these names is that this is a pure fishing exercise “in the hope that some name will be revealed which would prove to be a comparator”. On the other hand, the Claimant's attorney submits that the Claimant is entitled to know which officers with disciplinary or criminal matters obtained retroactive promotion upon reinstatement or dismissal of the cases against them.
45. I have no doubt that this information is something which the Claimant would like to have since the list of comparators may increase if the right set of combinations and permutations exist. The Claimant would want to know if the inequality of treatment is attributable in relation to persons other than Officer Hunte. But I foresee that a provision of the list does not end the issue there. The circumstances of any potential comparator would have to be further investigated and copies of their files requested, considered and other applications may possibly be spawned out of the investigation process causing delay of these proceedings.
46. If the application before the court at this present time is dismissed, the Claimant may well have available to him an application under the Freedom of Information Act Chapter 22:02 which would then potentially further delay this matter as the investigative information is secreted from the holders of that information.
47. I am of the view that the information referred to is both relevant and necessary for the fair disposition of this matter in relation to the issue whether the Claimant has been subjected to inequality of treatment under the Constitution. He has honed in in his application on certain named officers but the Defendant is, or ought to be, in a position to know if there are or were similarly circumstanced officers, other than the ones the Claimant knows about, and really ought to have disclosed that matter to this court under its duty of full and frank disclosure. In those circumstances, I would prefer to take a purposive approach to this matter so that it can be progressed at the speed that is intended under part 56 as best as is possible under the current situation of the court and utilize my case management powers to control the matter.
48. I would therefore make the order for the provision of those names as requested.

The costs of this application:

49. I am of the firm view that neither of these applications before me was necessary at the stage at which they were brought especially in light of the fact that the 1st case management conference had not been dealt with nor was any request made for the information sought. I also take into account the fact that both parties ought not to have proceeded to deal with the issue of the necessity to show change of circumstances in relation to the amendment sought for the reasons given above. Even though the Claimant brought the application unnecessarily, it is the duty of both sides to assist the court under the overriding objective and it should have been clear to all concerned very early on that an application for this amendment showing a change in circumstances was not necessary.
50. With respect to the application for disclosure, I have taken into account that no request was made and that 3 out of the 4 items requested were voluntarily provided despite submissions to the contrary.
51. As a result, I am minded to award the Defendant one half (1/2) of its costs of the application.

The Order:

52. In the circumstances, I make the following orders on the application filed on 13 May 2009:
 - 52.1. Leave to the Claimant to amend his claim form in the manner shown on the draft attached to the application dated 13 May 2009. Such amended Claim form to be filed and served by the 31st December 2009;
 - 52.2. The Defendant to provide to the Claimant's attorney at law by the 15th January 2010 the names of all police officers who won their disciplinary and/or criminal matters in court and were subsequently promoted with retroactive effect since July, 2003 to present.
 - 52.3. The Claimant to pay one half (1/2) of the Defendant's costs of the application to be assessed at the end of the hearing of the substantive matter – such costs not to be certified fit for advocate attorney.
 - 52.4. CMC adjourned to the 28th January 2010 at 9:00 am in POS 15.

Devindra Rampersad

Judge (ag.)

[Please note that this is the approved and finalized version of this judgment. All other versions are to be ignored.]